

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

CARLTON CHASE, ERIC MACCARTNEY
and LUANNE MUELLER, individually and
on behalf of others,

Case No. 3:18-cv-00568-AC

FINDINGS AND RECOMMENDATION

Plaintiffs,

v.

GORDON, AYLWORTH & TAMI, P.C. and
VISION INVESTIGATIVE SERVICE, LLC,

Defendants.

ACOSTA, Magistrate Judge:

Introduction

Plaintiffs Carlton Chase (“Chase”), Eric MacCartney (“MacCartney”), and Luanne Mueller (“Mueller”) (collectively, “Plaintiffs”) filed this lawsuit against Gordon, Aylworth & Tami, P.C. (“GAT”) and Vision Investigative Service, LLC (“Vision”) (collectively, “Defendants”). Plaintiffs allege multiple violations of the Fair Debt Collection Practices Act

(“FDCPA”) and Oregon’s Unlawful Trade Practices Act (“UTPA”). Plaintiffs also allege a claim for common law unjust enrichment against Defendants. In a previous Findings and Recommendation (“F&R”), this court recommended granting Defendants’ Motion to Dismiss Plaintiffs’ Amended Complaint (the “Motion”). (ECF No. 37.) In an Opinion and Order issued October 10, 2019, United States District Judge Michael H. Simon declined to adopt the F&R and denied the Motion. (Op. & Order, ECF No. 43.) Judge Simon returned the case for consideration of Defendant’s anti-SLAPP arguments. (Op. & Order at 17.) Accordingly, presently before this court is the portion of the Motion asserting anti-SLAPP arguments against Plaintiffs’ state law claims. (Mot., ECF No. 19, at 2.) For the reasons set forth below, the court recommends that the Motion be DENIED.¹

*Factual Background*²

Defendant GAT is a law firm with a large debt collection practice. (Class Action Allegation Am. Compl. (“Am. Compl.”) ¶ 2, ECF No. 17.) GAT filed separate lawsuits in state court against each of the Plaintiffs to collect debts owed to GAT’s client. (Am. Compl. ¶ 10). On May 4, 2017, GAT filed a lawsuit against Chase in Multnomah County Circuit Court, Case No. 17CV19572, to collect \$752.64 on a delinquent account. (Am. Compl. ¶ 22.) The same day, GAT filed a lawsuit against MacCartney in Multnomah County Circuit Court, Case No. 17CV18244, to collect \$1,057.48 on a delinquent account. (Am. Compl. ¶ 25.) On August 15, 2017, GAT filed a lawsuit against Mueller in Clackamas County Circuit Court, Case No.

¹ The court finds this motion appropriate for disposition without oral argument pursuant to Local Rule of Civil Procedure 7-1(d).

² The following facts are undisputed or are viewed in the light most favorable to Plaintiffs.

17CV35553, to collect \$1,303.49 on a delinquent account. (Am. Compl. ¶ 28.) Each of the three complaints stated that GAT was entitled to “actual costs and disbursements.” (Am. Compl. ¶ 10.)

In each case, GAT completed service of the lawsuit by certified and first-class mail. (Am. Compl. ¶ 10.) Service was completed on June 20, 2017, in Chase’s case, on May 30, 2017, in MacCartney’s case, and on August 21, 2017, in Mueller’s case. (Am. Compl. ¶ 23, 26, 29.) In each case, GAT used Vision, a company GAT owns and controls, to serve process. (Am. Compl. ¶ 7.)

In each case, the defendant in the action, a Plaintiff here, did not appear in the lawsuit, and the court entered a default judgment. (Am. Compl. ¶ 10.) In each case, GAT filed a statement of costs that included \$45 for “expedited service” of the complaint, which it represented was the actual and necessary cost. (Am. Compl. ¶ 10.) In each case, the defendant paid the debt in full and paid the costs and disbursements, including the expedited service fee. (Am. Compl. ¶ 24, 27, 30.)

In this purported class action, Plaintiffs contend that GAT violated the FDCPA and the UTPA by representing that it would seek only “actual costs and disbursements,” then submitting cost statements for expedited service fees that were neither necessary, reasonable, nor actually incurred. (Am. Compl. ¶ 41–48.) Plaintiffs also contend that charging for services either not actually provided or in excess of the actual cost of the service has unjustly enriched GAT and Vision, allowing both to unfairly profit from a collection scheme. (Am. Compl. ¶ 49.)

Defendants moved to dismiss all claims asserted by Plaintiffs under Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure and to dismiss Plaintiffs’ state law claims under Oregon’s anti-SLAPP statute, O.R.S. § 31.150. (Mot. at 2.) In a previous F&R issued August 1, 2019, this court recommended granting Defendants’ motion to dismiss all claims based on the

Rooker-Feldman doctrine and issue preclusion; this court declined to address Defendants’ anti-SLAPP arguments. (F&R at 17.) Plaintiffs timely objected. (ECF No. 39). In an Opinion and Order on October 10, 2019, Judge Simon declined to adopt the F&R, denied Defendants’ motion to dismiss under Rules 12(b)(1) and 12(b)(6), and returned the case to this court for consideration of Defendants’ anti-SLAPP arguments asserted against Plaintiffs’ state law claims. (Op. & Order at 17.)

Legal Standards

I. Motion to Dismiss under Rule 12(b)(6)

Under Rule 12(b)(6) of the Federal Rules of Civil Procedure, a party may move to dismiss a complaint for “failure to state a claim upon which relief can be granted.” A court may dismiss “on the lack of cognizable legal theory or the absence of sufficient facts alleged” under a cognizable legal theory. *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 718 F.3d 1006, 1014 (9th Cir. 2013) (quoting *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990)).

To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to “state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); see also *CallerID4u, Inc. v. MCI Commc’ns Servs. Inc.*, 880 F.3d 1048, 1061 (9th Cir. 2018). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Teixeira v. Cty. of Alameda*, 873 F.3d 670, 678 (9th Cir. 2017). The plausibility standard is not akin to a “probability requirement,” but it asks for more than a sheer possibility that a defendant has acted unlawfully. *Twombly*, 550 U.S. at 556. When a plaintiff’s complaint pleads facts that are “merely consistent with” a defendant’s

liability, the plaintiff's complaint "stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Id.* at 557 (brackets omitted).

The court must accept as true the allegations in the complaint and construe them in favor of the plaintiff. *Teixeira*, 873 F.3d at 678; *see also Iqbal*, 556 U.S. at 679; *Kwan v. SanMedica Int'l*, 854 F.3d 1088, 1096 (9th Cir. 2017). The pleading standard under Rule 8 "does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555); *see also* FED. R. CIV. P. 8(a) (2). "A pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do." *Iqbal*, 556 U.S. at 678 (internal citations omitted); *Kwan*, 854 F.3d at 1096. A complaint also does not suffice if it tenders "naked assertion[s]" devoid of "further factual enhancement." *Twombly*, 550 U.S. at 557. "In ruling on a 12(b)(6) motion, a court may generally 'consider only allegations contained in the pleadings, exhibits attached to the complaint, and matters properly subject to judicial notice.'" *Akhtar v. Mesa*, 698 F.3d 1202, 1212 (9th Cir. 2012) (quoting *Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007) (*per curiam*)). In deciding a Rule 12(b)(6) motion, the court may also consider documents attached to the pleading without converting the motion into one for summary judgment. *See* FED. R. CIV. P. 10(c); *Lee v. City of Los Angeles*, 250 F.3d 668, 688–89 (9th Cir. 2001).

II. Special Motion to Strike

A. *Oregon's Anti-SLAPP Statute*

Oregon's anti-SLAPP statute³ provides "an expedited procedure for dismissal of certain nonmeritorious civil cases without prejudice at the pleading stage." OR. REV. STAT. § 31.150

³ "SLAPP" is an acronym for strategic lawsuit against public participation. *Young v. Davis*, 259 Or. App. 497, 499 (2013).

(2019); *Neumann v. Liles*, 358 Or. 706, 723 (2016). The statute provides a “two-step burden-shifting process.” *Wingard v. Or. Family Council, Inc.*, 290 Or. App. 518, 521 (2018). In the first step, the defendant making a special motion to strike must demonstrate that “the claim against which the motion is made arises out of” protected activities described in O.R.S. § 31.150(2). OR. REV. STAT. § 31.150(3); *Plotkin v. State Accident Ins. Fund*, 280 Or. App. 812, 815 (2016). If the defendant meets this burden, the burden then shifts to the plaintiff “to establish that there is a probability that the plaintiff will prevail on the claim by presenting substantial evidence to support a prima facie case.” OR. REV. STAT. § 31.150(3); *Handy v. Lane Cty.*, 360 Or. 605, 612 (2016). If the plaintiff meets this burden, the court must deny the special motion to strike. OR. REV. STAT. § 31.150 (3). If the plaintiff fails to meet the burden, the court must dismiss the claim without prejudice. OR. REV. STAT. § 31.150(1); *Handy*, 360 Or. at 612.

B. Anti-SLAPP Motions in Federal Court

In a recent F&R, U.S. Magistrate Judge Stacie F. Beckerman explained the treatment of anti-SLAPP motions in federal court.

Federal courts generally apply state substantive law and federal procedural law. *Hanna v. Plumer*, 380 U.S. 460, 465 (1965). Although anti-SLAPP motions appear to be a procedural mechanism to vindicate existing substantive rights, they are generally allowed in federal court. *See U.S. ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 970–73 (9th Cir. 1999) (holding that some of California’s anti-SLAPP provisions do not “directly interfere with the operation” of the Federal Rules of Civil Procedure); *see also Gardner v. Martino*, 563 F.3d 981, 991 (9th Cir. 2009) (applying Oregon’s anti-SLAPP statute). However, the Ninth Circuit has held that not all provisions of a state anti-SLAPP statute apply in federal court. *See Metabolife Intern., Inc. v. Wornick*, 264 F.3d 832, 846 (9th Cir. 2001) (holding that “the discovery-limiting aspects of [anti-SLAPP motions] collide with the discovery-allowing aspects of Rule 56”); *see also AR Pillow Inc., v. Maxwell Payton, LLC*, No. C11-1962-RAJ, 2012 WL 6024765, at *3 (W.D. Wash. Dec. 4, 2012) (“[T]he Ninth Circuit’s holding that the automatic stay of discovery in California’s statute does not apply in federal court applies equally to [Washington’s anti-SLAPP statute].”).

To eliminate any lingering conflict, the Ninth Circuit recently adopted a tiered approach to anti-SLAPP motions. *See Planned Parenthood Fed'n of Am., Inc. v. Ctr. for Med. Progress*, 890 F.3d 828 (9th Cir. 2018). “[W]hen an anti-SLAPP motion to strike challenges only the legal sufficiency of a claim, a district court should apply the Federal Rule of Civil Procedure 12(b)(6) standard and consider whether a claim is properly stated.” *Planned Parenthood*, 890 F.3d at 834. By contrast, “when an anti-SLAPP motion to strike challenges the factual sufficiency of a claim, . . . the Federal Rule of Civil Procedure 56 standard will apply.” *Id.* If the defendant’s motion challenges the factual sufficiency of a claim, “discovery must be allowed . . . before any decision is made by the court.” *Id.* This is because “[r]equiring a presentation of evidence without accompanying discovery would improperly transform the motion to strike under the anti-SLAPP law into a motion for summary judgment without any of the procedural safeguards that have been firmly established by the Federal Rules of Civil Procedure.” *Id.*

Miller v. Watson, No. 3:18-CV-00562-SB, 2019 WL 1871011, at *4 (D. Or. Feb. 12, 2019), *adopted*, 2019 WL 1867922 (D. Or. Apr. 25, 2019) (footnote omitted).

Accordingly, the second step of the anti-SLAPP analysis is treated differently in federal court compared to Oregon state court. *See Miller*, 2019 WL 1871011, at *4; *Zweizig v. Nw. Direct Teleservices, Inc.*, No. 3:15-CV-02401-HZ, 2018 WL 6062316, at *2 (D. Or. Nov. 20, 2018). In state court, “presenting a prima facie case means that the plaintiff has presented enough evidence to avoid a directed verdict—namely, enough evidence to meet the plaintiff’s burden of production.” *Handy*, 360 Or. at 618. A federal court instead evaluates the legal sufficiency of the plaintiff’s prima facie case under the Rule 12(b)(6) standard, without requiring the presentation of evidence. *Planned Parenthood*, 890 F.3d at 834; *Miller*, 2019 WL 1871011, at *4; *Zweizig*, 2018 WL 6062316, at *2. As Judge Beckerman notes, “[t]his reasoning appears to defeat the purpose of an anti-SLAPP motion, and converts it to a standard Rule 12(b)(6) motion to dismiss.” *Miller*, 2019 WL 1871011, at *4 n.6. A district court’s evaluation of the factual sufficiency of the plaintiff’s prima facie case must wait until after discovery. *Planned Parenthood*, 890 F.3d at 834; *Miller*, 2019 WL 1871011, at *4.

III. Preliminary Procedural Matters

In the August 2019 F&R, the court took judicial notice of the docket sheets, statements for costs and disbursements, general judgments, and satisfactions of judgments filed in each of the underlying state court cases. (F&R at 7.) For the reasons discussed in the court’s prior F&R, the court again takes judicial notice of these documents. (F&R at 7.) In the prior F&R, the court also considered the same documents under the incorporation by reference doctrine. (F&R at 7–8.) For the reasons discussed in the court’s prior F&R, the court again finds it appropriate to consider these documents under the incorporation by reference doctrine. (F&R at 7–8.) *See Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 998 (9th Cir. 2018).

Plaintiffs and Defendants have attached documentary evidence in support of their respective positions. As discussed in greater detail below, the court declines to judicially notice these documents or incorporate them by reference because the court must resolve Defendants’ anti-SLAPP motion as a Rule 12(b)(6) motion.

Discussion

Defendants argue that under Oregon’s anti-SLAPP statute, the court should strike Plaintiffs’ state law claims under the UTPA and for common law unjust enrichment. The special motion to strike under anti-SLAPP requires a two-step process. OR. REV. STAT. § 31.150(3). The court addresses each step in turn.

I. Protected Activity

At the first step of the anti-SLAPP analysis, the moving defendant must demonstrate that “the claim against which the motion is made arises out of a statement, document or conduct” protected by the statute. OR. REV. STAT. § 31.150(3). Protected activities under O.R.S. § 31.150(2) include “[a]ny oral or written statement or document submitted in a . . . judicial

proceeding” and “[a]ny oral or written statement made or document submitted in connection with an issue under consideration or review by a . . . judicial body.”

Defendants argue that Plaintiff’s state law claims arise out of protected activity under the statute because they arise out of Defendants’ petitioning activities in the underlying debt collection lawsuits. (Suppl. Submission in Supp. of Defs.’ Anti-SLAPP Mot. to Strike (“Defs.’ Suppl.”) at 5, ECF No. 48.) Plaintiffs do not dispute that the anti-SLAPP statute applies. Oregon “enacted an ‘anti-SLAPP’ statute on the rationale that a SLAPP’s purpose, rather than to bring a legitimate claim, is to chill a person’s ‘participation in public affairs.’” *Handy v. Lane Cty.*, 274 Or. App. 644, 650, (2015), *aff’d in part, rev’d in part*, 360 Or. 605, 385 P.3d 1016 (2016) (citing *Clackamas River Water v. Holloway*, 261 Or. App. 852, 854 n.1, (2014)). The statute, however, applies to all conduct described in O.R.S. § 31.150(2), regardless of the plaintiff’s motive in filing the suit. *See Schwern v. Plunkett*, 845 F.3d 1241, 1246 (9th Cir. 2017) (applying the statute in a dispute between a wife and husband); *Plotkin*, 280 Or. App. at 816–17 (applying the statute in a dispute between two former CEOs); *Wingard*, 290 Or. App. at 520 (applying the statute in a dispute between an unsuccessful candidate for political office and an organization that opposed his candidacy); *see also Deep Photonics Corp. v. LaChapelle*, 282 Or. App. 533, 543 (2016) (noting that some conduct protected under the statute need not pass any public interest requirement). Accordingly, a lawsuit need not be a paradigmatic SLAPP case for the anti-SLAPP statute to apply.

Plaintiffs’ claims under the UTPA arise out of statements, documents, and conduct in the underlying debt collection lawsuit, including the complaints GAT filed and Vision served and the cost statements GAT submitted. (Am. Comp. ¶ 10.) The complaints and cost statements are “written statement[s] made or document[s] submitted in a . . . judicial proceeding” and “written statement[s] made or document[s] submitted in connection with an issue under consideration or

review by a . . . judicial body.” OR. REV. STAT. § 31.150(2)(a), (b).⁴ Thus, Defendants have carried their burden at the first step of the anti-SLAPP analysis by demonstrating that the claims arise out of protected conduct.

II. Probability of Prevailing on the Claim

In the second step of the anti-SLAPP analysis, “the burden shifts to the plaintiff in the action to establish that there is a probability that the plaintiff will prevail on the claim by presenting substantial evidence to support a prima facie case.” OR. REV. STAT. § 31.150(3). Defendants argue that Plaintiffs cannot establish a probability of prevailing on the claims because their claims are barred as a matter of law by Oregon’s litigation privilege. (Defs.’ Suppl., 8.) In the alternative, Defendants argue that Plaintiffs lack substantial evidence to support a prima facie case for their state law claims. (Defs.’ Suppl., 11.) These arguments are addressed in turn below.

A. *Litigation Privilege*

Plaintiffs argue that the litigation privilege does not defeat their claims as a matter of law, and thus they are not barred from establishing a probability of prevailing on the claims. (Pls.’ Suppl. Submission (“Pls.’ Suppl.”) at 14–15, ECF No. 50.) A plaintiff opposing an anti-SLAPP motion in federal court must overcome substantive defenses that would prevent the plaintiff from properly stating a claim under Rule 12(b)(6). *See Planned Parenthood*, 890 F.3d at 834 (holding that the plaintiff’s burden at step two in the anti-SLAPP analysis is to properly state a claim); *see also Flatley v. Mauro*, 139 P.3d 2, 17 (Cal. 2006) (providing that a plaintiff opposing an anti-SLAPP motion must overcome the substantive defense of the litigation privilege in order to show

⁴ Defendants also contend that the claims arise out of conduct covered by O.R.S. § 31.350(2)(d). This subsection, which is not necessary for Defendants’ burden at step one, does not apply here. *See Deep Photonics Corp. v. LaChapelle*, 282 Or. App. 533, 542 (2016).

a probability of prevailing). Application of the litigation privilege can prevent a plaintiff from carrying the burden in the second step of the anti-SLAPP analysis. *See, e.g., Fauley v. Mosman*, No. 3:17-CV-01656-RJB, 2018 WL 664806, at *6 (D. Or. Feb. 1, 2018) (finding plaintiff failed to demonstrate a probability she will prevail on her fraud claim because the claim arose out of documents protected by the litigation privilege); *Wickenkamp v. Hostetter Law Grp., LLP*, No. 2:15-CV-296-PK, 2016 WL 10677908, at *19 (D. Or. July 14, 2016), *adopted*, 2016 WL 10677905 (D. Or. Aug. 17, 2016) (striking the plaintiff's claim under anti-SLAPP because her showing was "inadequate to establish that she has a probability of successfully overcoming the absolute litigation privilege").

1. application of the privilege

Oregon law provides an absolute privilege for the statements and conduct of parties and their attorneys "undertaken in connection with litigation." *Mantia v. Hanson*, 190 Or. App. 412, 417, 423 (2003). Although the litigation privilege originated as a bar to defamation claims, Oregon courts have explicitly extended the privilege to "any tort action." *Id.* at 420–27 (quoting *Wollam v. Brandt*, 154 Or. App. 156, 162 n.5 (1998)); *see also Yeti Enterprises Inc. v. NPK, LLC*, No. 3:13-cv-012003-ST, 2015 WL 3952115, at *5 (D. Or. June 29, 2015) (reaching the same conclusion).

To be covered by the privilege, statements and conduct must "have some reference to the subject matter of the pending litigation." *Wollam*, 154 Or. App. at 162. In other words, the statement or conduct must be "pertinent and relevant to the issues." *Id.* at 162–63 (quoting *Irwin v. Ashurst*, 158 Or. 61, 68 (1938)). "In determining whether the argument was pertinent or relevant to the issues, courts are liberal, and the privilege . . . embraces anything that may possibly be pertinent. All doubts should be resolved in favor of its relevancy and pertinency." *Irwin*, 158

Or. at 70. “Whether the matter . . . was pertinent or relevant is a question of law for the court to decide.” *Chard v. Galton*, 277 Or. 109, 113 (1977) (quoting *McKinney v. Cooper*, 163 Or. 512, 519 (1940)).

Plaintiffs contend that the absolute litigation privilege does not apply to conduct associated with collection of service costs because such conduct is not pertinent and relevant to the legal issues in a lawsuit. (Pls.’ Suppl., at 24–25.) Although the amount of service costs incurred may not help to determine the specific legal issues in a debt collection lawsuit, collection of service costs at the very least has some reference to the subject matter; it is only because of the litigation that Defendants incurred service costs and sought service costs from Plaintiffs. Because the court must resolve all doubts in favor of relevancy and pertinency, Plaintiff’s argument is unavailing. Conduct associated with collection of service costs has sufficient reference to the subject matter of litigation to trigger the litigation privilege under the liberal relevant standard.

2. exceptions to the privilege

Oregon courts have articulated one clear exception to the absolute litigation privilege: where the underlying conduct satisfies the elements of wrongful initiation of civil proceedings. *Mantia*, 190 Or. App. at 429. The elements of wrongful initiation are:

(1) The commencement and prosecution by the defendant of a judicial proceeding against the plaintiff; (2) The termination of the proceeding in the plaintiff’s favor; (3) The absence of probable cause to prosecute the action; (4) The existence of malice, or as is sometimes stated, the existence of a primary purpose other than that of securing adjudication of the claim; and (5) Damages.

Alvarez v. Retail Credit Ass’n, 234 Or. 255, 259–60 (1963). Plaintiffs cannot satisfy the elements of wrongful initiation in this case because the debt collection lawsuits served the primary purpose of securing adjudication of the debt collection claims against each Plaintiff and were not terminated in Plaintiffs’ favor.

Although the exception for conduct that satisfies the elements of wrongful initiation does not apply here, it informs this court's analysis. In *Mantia*, the Oregon Court of Appeals rejected an "exclusive tort approach" under which only *claims for* wrongful initiation overcome the litigation privilege. *Mantia*, 190 Or. App. at 427–28 (explaining that Oregon case law "do[es] not permit quite so simple a solution"). Instead, claims based on *conduct that satisfies the elements of* wrongful initiation overcome the privilege. *Id.* at 429. This distinction emphasizes the need to look past legal labels in assessing whether the litigation privilege shields particular conduct. Accordingly, this analysis focuses on the nature of Defendants' alleged conduct, rather than legal labels, to determine whether the litigation privilege applies.⁵

Relying on *Mantia*, Defendants argue that the *only* exception to Oregon's litigation privilege is for conduct that satisfies the elements of wrongful initiation. (Defs.' Suppl., 10.) Plaintiffs respond that the litigation privilege cannot immunize all litigation-related conduct. Also relying on *Mantia*, Plaintiffs argue that the litigation privilege does not immunize litigation-related conduct where, as contended here, doing so would frustrate the underlying purpose of the privilege. (Pls.' Suppl. 20–24.) Plaintiffs additionally contend that if only conduct satisfying the elements of wrongful initiation can escape the litigation privilege, Defendants would have a "blank check" to pursue inflated costs wherever underlying litigation serves a legitimate purpose. (Plaintiffs' Sur-Reply at 18–19, ECF No. 34.)

⁵ The Oregon Supreme Court's decision in *Gordon v. Rosenblum*, 361 Or. 352 (2017), implicitly embraces the idea that it is the nature of conduct, rather than a legal label, that matters in assessing attorney accountability for wrongdoing. In that case, conduct constituting unfair trade practices was subject to the UTPA regardless of the legal label put on the relationship between business and consumer. *Id.*; see also discussion of *Gordon infra*.

Mantia provides a detailed analysis of the litigation privilege’s application. In *Mantia*, third-party plaintiff Darrel Hanson brought a claim against the law firm that represented his former employee in the employee’s suit against him. *Mantia*, 190 Or. App. at 414. Hanson alleged that the firm’s continued pursuit of the employee’s claims after Hanson had sent the firm a letter saying the claims were frivolous constituted tortious interference. *Id.* at 415. The firm argued that the litigation privilege barred Hanson’s claim. *Id.* The Oregon Court of Appeals reviewed in detail Oregon’s case law on the liability of attorneys for their actions in litigation, navigating “a fundamental tension between the law of ‘litigation privilege,’ as applied to attorneys, and the recognition that there are exceptions—most obviously the availability of ‘wrongful initiation’ actions against attorneys—to the general principle that attorneys cannot be civilly liable for actions undertaken in representing a client.” *Id.* at 417. The Oregon Court of Appeals reaffirmed the absolute litigation privilege, rejecting the Hanson’s argument that only a qualified, good-faith privilege protected attorneys. *Id.* As noted above, the court also clarified that the litigation privilege yields where an attorney’s conduct satisfies the elements of wrongful initiation of civil proceedings. *Id.* at 429. Because the underlying litigation had not yet terminated, Hanson could not satisfy the elements of wrongful initiation within his tortious interference claim; therefore, the litigation privilege applied and barred the claim. *Id.* at 429–30.

In its analysis of the case law, the *Mantia* court recognized a broad principle: that the litigation privilege will not defeat a tort claim “where the nature of the defendant’s conduct was such that the underlying purposes of the privilege would not be served by immunizing that conduct.” *Id.* at 429 (citing *Top Serv. Body Shop v. Allstate Ins. Co.*, 283 Or. 201, 208–10 (1978) (“Even a recognized privilege may be overcome when the means used by defendant are not justified by the reason for recognizing the privilege.”)).

The purpose of the litigation privilege is to “secur[e] to attorneys as officers of the court the utmost freedom in their efforts to secure justice for their clients.” *Chard*, 277 Or. 109 at 112 (quoting Restatement (Second) of Torts § 586 cmt. a). The privilege provides this freedom by removing the threat of retaliatory litigation stemming from parties’ efforts to vindicate their rights. *Ramstead v. Morgan*, 219 Or. 383, 387 (1959); *Coultas v. Liberty Mut. Fire Ins. Co.*, No. 3:15-CV-00237-PK, 2016 WL 2637802, at *5 (D. Or. May 9, 2016). Such a policy makes trade-offs; the litigation privilege can immunize malicious actions in service of the overall goal of protecting the pursuit of justice. *Ramstead*, 219 Or. at 387; *see also Moore v. West Lawn Mem’l Park*, 266 Or. 244, 249, 512 P.2d 1344 (1973) (noting that where privilege applies, attorneys are protected from liability even for malicious actions); *Brown v. Gatti*, 195 Or. App. 695, 701 (2004) *rev’d on other grounds* 341 Or. 452 (2006) (“The privilege, in other words, confers a license to lie.”).

After stating the broad principle that the litigation privilege yields where immunizing certain conduct will not serve the purpose of the privilege, the *Mantia* court explained:

At first blush, that formulation may seem inscrutable: When is an absolute privilege not absolute? But at least with respect to the absolute privilege pertaining to participation in judicial and quasi-judicial proceedings, there is a ready answer: An actor’s conduct is so egregious as to be deprived of the protections of the absolute privilege when that conduct satisfies the elements of wrongful initiation.

Mantia, 190 Or. App. at 429. Accordingly, the exception for conduct satisfying the elements of wrongful initiation is an application of the broad principle. *Id.* at 429; *see also Yeti*, 2015 WL 3952115, at *5 (recognizing that the wrongful initiation exception is an instance of the broad limit articulated in *Mantia*).

The court in *Mantia* found that when there is conduct that satisfies the elements of wrongful initiation, the privilege’s purpose of securing freedom to vindication the parties’ rights is not served by immunizing the offending conduct, and the litigation privilege cannot apply. *Mantia*,

190 Or. App. at 429. *Mantia* does not directly address the question of whether or which other conduct that does not satisfy the elements of wrongful initiation may still overcome the privilege where immunizing that conduct would not serve the purposes of the litigation privilege. Furthermore, neither the Oregon Supreme Court nor the Oregon Court of Appeals has clarified the issue after *Mantia*.⁶

Defendants urge this court to find that the *only* exception to Oregon’s litigation privilege is for conduct that satisfies the elements of wrongful initiation. This position finds support in some recent cases in this district. *MacVicar v. Barnett*, No. 3:18-CV-01378-HZ, 2019 WL 2361040, at *11 (D. Or. June 1, 2019) (“with the sole exception of claims for [conduct satisfying the elements of] wrongful initiation of civil proceedings . . . , a plaintiff cannot bring tort claims against a defendant for statements made in the course of or incident to litigation regardless of their purpose”); *see also Yeti*, 2015 WL 3952115, at *5 (equating the broad language in *Mantia* with only the wrongful initiation exception). In *MacVicar*, the plaintiffs brought claims against the defendants, a law firm and lawyers, arising out of the defendants’ conduct in debt collection litigation against one of the plaintiffs. *MacVicar*, 2019 WL 2361040, at *3. The plaintiffs argued that the litigation privilege should not apply to statements by defendants that they alleged constituted extrinsic fraud on the court in the underlying litigation. *Id.* at *11. The court noted that the litigation privilege can shield attorneys’ malicious conduct and lies, and it held that litigation privilege applied because there was no wrongful initiation. *Id.* Although the court cited *Mantia* for the proposition that only conduct that satisfies the elements of wrongful initiation

⁶ The Oregon Court of Appeals reasoned from the same broad principle in *Brown v. Gatti*, 195 Or. App. 695, 703 (2004), *aff’d in part, rev’d in part*, 341 Or. 452 (2006) (“Nor can we imagine how immunizing the statements in such a situation would promote the policy objectives that the privilege is designed to achieve.”).

escapes the litigation privilege, *id.* at *10, it did not address *Mantia*'s observation that "[e]ven a recognized privilege may be overcome when the means used by defendant are not justified by the reason for recognizing the privilege," *see Mantia*, 190 Or. App. at 429.

In contrast, where the district court has grappled with *Mantia*'s broader principle, it has understood the language as describing a limit on the litigation privilege that addresses more than just conduct satisfying the elements of wrongful initiation. In a 2016 Opinion and Order, U.S. Magistrate Judge Paul Papak discussed how the limit noted in *Mantia* prevents the litigation privilege from becoming a shield for any and all wrongdoing in the course of litigation. *Coultas*, 2016 WL 2637802, at *5.

According to Plaintiffs, the logical extension of applying the litigation privilege to this case would be immunity for a lawyer who "runs down a pedestrian in the crosswalk on his way to the court," "absconds with . . . settlement proceeds," or "steals a diamond ring from its true owner in order to present it as evidence in court." *See* Plfs.' Resp. 20–21 (#92). Not so. In *Mantia*, the Oregon Court of Appeals held that the litigation privilege does not apply "where the nature of the defendant's conduct was such that the underlying purposes of the privilege would not be served by immunizing that conduct." 79 P.3d at 414. Immunizing the conduct in the above-quoted scenarios would not further the ability of parties to vindicate their rights in court without fear of retaliatory lawsuits. Consequently, Plaintiffs' slippery slope concerns are unfounded.

Id.

This court agrees with Plaintiffs and with the persuasive rationale in *Coultas* that the litigation privilege's purpose provides a limit on its scope. Even conduct that does not meet the elements of wrongful initiation may fall outside the litigation privilege if it does not serve the purpose of enabling the parties to vindicate their rights in court without fear of retaliation. Accordingly, if the purposes of the litigation privilege would not be served by immunizing the conduct at issue in this case, the court will not apply the litigation privilege to shield that conduct.

In this case, immunizing the Defendants' alleged conduct would not serve the purpose of the litigation privilege. Immunizing the conduct Plaintiffs allege here, misrepresenting service costs and seeking inflated fees for expedited service that was not necessary or actually incurred, would have no bearing on attorneys' ability to pursue justice for their clients in the litigation.⁷ Instead, immunizing such conduct would provide an avenue for attorneys to gain unearned costs and fees in conjunction with their work vindicating their clients' rights. Furthermore, instead of securing freedom from retaliation for actions taken to vindicate a claim, immunizing the conduct alleged here would secure cover for wrongs that escape redress.

Immunizing Defendants' alleged conduct in this case would undermine the pursuit of justice and thwart the policy behind the litigation privilege because the alleged conduct constitutes fraud on the court. Courts have derived their definition of "fraud on the court" primarily from Professor Moore, who wrote the following in *Moore's Federal Practice*:

"Fraud upon the court" should, we believe, embrace only that species of fraud which does or attempts to, defile the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery can not perform in the usual manner its impartial task of adjudging cases that are presented for adjudication.

In re Levander, 180 F.3d 1114, 1119 (9th Cir. 1999). Stated alternatively, a "fraud on the court" occurs where it can be demonstrated, clearly and convincingly, that a party has sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system's ability impartially to adjudicate a matter by improperly influencing the trier or unfairly hampering the presentation of the opposing party's claim or defense." *Aoude v. Mobile Oil Corp.*, 892 F.2d

⁷ In contrast, the conduct at issue in *Mantia*, *MacVicar*, and other cases applying Oregon's litigation privilege involved attorneys' work to vindicate the merits of clients' claims. *E.g.*, *Mantia*, 190 Or. App. at 415 (law firm pursued employee's claims after employer sent the firm a letter saying the claims were frivolous); *MacVicar*, 2019 WL 2361040, at *3 (law firm vigorously pursued debt collection claim).

1115, 1118 (1st Cir. 1989) (citing *Alexander v. Robertson*, 882 F.2d 421, 424 (9th Cir. 1989)). Whereas the litigation privilege aims to ensure the courts function as forums to vindicate the parties' rights, fraud on the court subverts that aim by preventing a court from functioning as an impartial adjudicator. Accordingly, immunizing conduct that constitutes fraud on the court is unlikely to serve the purposes of the litigation privilege. See *Silberg v. Anderson*, 786 P.2d 365, 370 (Cal. 1990), *as modified* (Mar. 12, 1990) (explaining that California's litigation privilege does not apply in cases of extrinsic fraud); *Kimes v. Stone*, 84 F.3d 1121, 1127 n.3 (9th Cir. 1996) (same).

Judge Simon's prior Opinion and Order in this case found that Plaintiffs adequately alleged GAT engaged in fraud on the state court, a form of extrinsic fraud, by falsely representing that it would seek only actual costs incurred for service. (Op. & Order at 11.) Plaintiffs allege GAT engaged in an unconscionable scheme that deprived Plaintiffs of the notice they needed to be able to contest the alleged excessive fees. (Pls.' Objs. to F&R at 27, ECF No. 39.) This scheme impaired the court's ability to impartially adjudicate Plaintiffs' cases by hampering presentation of any defense from Plaintiffs. In direct opposition to the litigation privilege's purpose of enabling parties to vindicate their rights in the judicial system, the fraud alleged in this case interfered with the judicial system's ability to adjudicate the parties' rights. Because immunizing the alleged conduct undermines the purpose of the litigation privilege, the litigation privilege does not apply to the conduct that forms the basis of Plaintiffs' state law claims. Plaintiffs' state law claims under the UTPA and for common law unjust enrichment do not fail as a matter of law based on litigation privilege.

Plaintiffs additionally argue that, in light of the Oregon Supreme Court's decision in *Gordon v. Rosenblum*, 361 Or. 352 (2017), finding that the debt collection litigation practices of

GAT's predecessor firm were subject to the UTPA, the Oregon Supreme Court would likely find that the litigation privilege does not apply to shield those same practices from a UTPA claim. (Pls.' Suppl. 15–20.) Because this court finds that litigation privilege does not apply for the reasons discussed above, this court need not analyze how the Oregon Supreme Court would treat Plaintiffs' UTPA claims specifically.

B. Plaintiffs' Prima Facie Case

Without the bar of the litigation privilege, Plaintiffs' task at the second step of the anti-SLAPP analysis remains to "establish that there is a probability that the plaintiff will prevail on the claim by presenting substantial evidence to support a prima facie case." OR. REV. STAT. § 31.150(3). As noted above, in federal court, an anti-SLAPP motion to strike that challenges the legal sufficiency of the claim must be evaluated under Rule 12(b)(6) to determine if the plaintiff has properly stated a claim. *Planned Parenthood*, 890 F.3d at 834. Accordingly, here, Plaintiffs have the burden of showing that they have stated a claim upon which relief can be granted.⁸ Plaintiffs properly state claims under the UTPA and for unjust enrichment and therefore carry their burden at step two of the anti-SLAPP analysis.

1. legal sufficiency of Plaintiffs' UTPA claim

Plaintiffs allege Defendant GAT violated the UTPA by:

[S]tating in the complaints it filed and served on consumers that it was seeking only 'actual costs and disbursements' when it knew that it would be collecting service costs that were more than the actual costs paid for the service by mail, as well as an unnecessary, unreasonable, and excessive fee for expedited service.

⁸ This court observes that Judge Simon's Opinion and Order in this case previously denied Defendants' Motion to Dismiss based on failure to state a claim under Rule 12(b)(6). (Op. & Order at 17.) Here, because Defendants have asserted their motion in the anti-SLAPP context, the burden is on Plaintiffs to demonstrate that they properly state each claim. *See* OR. REV. STAT. § 31.150(3).

(Am. Compl. ¶ 46.) Plaintiffs allege that GAT then submitted misleading cost statements to enable it to collect an excessive fee in each case. (Am. Compl. ¶ 47.) The relevant section of the UTPA provides:

(1) A person engages in an unlawful practice if in the course of the person's business, vocation or occupation the person does any of the following:

* * *

(b) Causes the likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of real estate, goods or services.

OR. REV. STAT. § 646.608(1)(b).

Section 646.638(1) of the UTPA authorizes “a person who suffers an ascertainable loss of money or property, real or personal, as a result of another person's willful use or employment of a method of a method, act or practice declared unlawful under ORS 646.608,” to bring an action in an appropriate court. To state a viable claim under § 646.638(1), a plaintiff must allege: “(1) a violation of § 646.608(1), (2) causation, (3) damages, and (4) willfulness by Defendant.” *Bank of New York Mellon v. Stabenow*, No. 3:16-cv-01590-MO, 2017 WL 1538156, at *5 (D. Or. April 25, 2017) (quoting *Colquitt v. Mfrs. & Traders Trust Co.*, No.: 3:15-cv-00807-BR, 2016 WL 1276095, at *5 (D. Or. April 1, 2016)). The plaintiff must allege with specificity the conduct identified as a violation of O.R.S. § 646.608(1). See *Stabenow*, 2017 WL 1538156, at *5; *Colquitt*, 2016 WL 1276095, at *5. Additionally, the plaintiff must identify an “ascertainable loss and damages incurred as a result” of the unfair business practice. *Stabenow*, 2017 WL 1538156, at *5. “Any loss will satisfy that requirement so long as it is ‘capable of being discovered, observed, or established.’” *Feitler v. Animation Celection, Inc.*, 170 Or. App. 702, 712 (2000) (quoting *Scott v. Western Int. Sales, Inc.*, 267 Or. 512, 515 (1973)). Finally, the “plaintiff must

‘include any allegations from which the Court could infer Defendant knew or should have known [its conduct] was a violation of the UTPA.’” *Stabenow*, 2017 WL 1538156, at *5.

To satisfy the first element, Plaintiffs claim that Defendant GAT violated § 646.608(1)(b). (Pls.’ Suppl., 26–27.) A violation of § 646.608(1)(b) “occurs when three elements are present: (1) a person (2) in the course of the person’s business, vocation or occupation (3) causes likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of, among other things, a loan or extension of credit.” *Gordon*, 361 Or. at 367 (internal quotations and alterations omitted). The Oregon Supreme Court explained what these elements require.

In short, the text requires only two relationships. First, the person must “cause[]” the likelihood of confusion or misunderstanding experienced by the other person. And second, that causal relationship must exist in the context of “the course of the [first] person’s business, vocation or occupation,” that is, the causal relationship must “arise out of transactions which are at least indirectly connected with the ordinary and usual course of [the person’s] business, vocation or occupation.”

Gordon, 361 Or. at 369 (citations omitted).

Here, Plaintiffs have pleaded factual conduct showing that GAT is a “person” for purposes of the UTPA.⁹ (Am. Compl. ¶ 16.) Plaintiffs have pleaded facts showing the first required relationship: that GAT caused the likelihood of confusion or misunderstanding for Plaintiffs by stating in its complaints that it would seek only “actual costs and disbursements” when it would in fact seek a \$45 fee for expedited service that was not necessary or even incurred. (Am. Compl. ¶ 46.) Plaintiffs have also pleaded that this causal relationship exists in the context of GAT’s business because GAT is a high-volume debt collection firm that regularly collects debts in the course of its business, filing thousands of lawsuits per year. (Am. Compl. ¶ 2.) Plaintiffs have

⁹ “‘Person’ means natural persons, corporations, trusts, partnerships, incorporated or unincorporated associations and any other legal entity except bodies or officers acting under statutory authority of this state or the United States.” OR. REV. STAT. § 646.605(4).

plausibly pleaded a violation of O.R.S. § 646.608(1)(b), necessary to satisfy the first element of a UTPA claim.

To satisfy elements two and three of causation and damages, Plaintiffs have adequately identified an “ascertainable loss and damages incurred as a result” of the unfair business practice: the excessive service costs, over the actual costs necessary or incurred, that Plaintiffs each paid to GAT as a result of GAT seeking a \$45 fee for expedited service. (Am. Compl. ¶ 10.) The alleged excess amount paid is “capable of being discovered, observed, or established.” *Feitler*, 170 Or. App. at 712.

Finally, to satisfy the fourth element of a UTPA claim, willfulness, Plaintiffs include allegations from which this court can infer GAT knew or should have known its conduct regarding cost charges violated the UTPA. Plaintiffs note that GAT is a law firm run by attorneys, supporting an inference that the attorneys were aware or should have been aware of the legal requirements and limits on their fee collection activities. (Pls.’ Suppl., 31). Furthermore, Plaintiffs note that GAT’s predecessor firm had been in litigation with the State of Oregon Department of Justice over violations of the UTPA, supporting an inference that GAT would be knowledgeable about what the law prohibits. (Am. Compl. ¶ 16.) Plaintiffs have plausibly pleaded that the violation was willful, as required by O.R.S. § 646.648(1), because the facts as alleged support an inference that Defendants knew or should have known their conduct violated the UTPA. Accordingly, Plaintiffs have stated a claim on which relief can be granted under the UTPA.

2. legal sufficiency of Plaintiffs’ unjust enrichment claim

Plaintiffs assert a claim for unjust enrichment against both Defendants, alleging that GAT and Vision “are alter egos of each other and worked together in concert in a common scheme to

profit from the collection of service fees that were not allowed by law, were not the actual costs paid to any third party for service by mail, were unnecessary and unreasonable and excessive.” (Am. Comp. ¶ 48.) Plaintiffs seek restitution. (Am. Comp. ¶ 48.)

In Oregon, unjust enrichment claims are determined on a “case-by-case basis.” *The Hoag Living Tr. dated Feb. 4, 2013 v. Hoag*, 292 Or. App. 34, 45 (2018) (citing *Larisa’s Home Care, LLC v. Nichols-Shields*, 362 Or. 115 (2017)). “[C]ourts should decide whether ‘any particular enrichment is unjust by examining whether the case type matches already recognized forms of unjust enrichment.’” *Id.* (citing *Larisa’s*, 362 Or. at 128). “A conclusion that one party has obtained benefits from another by fraud is . . . one of the most recognizable sources of unjust enrichment.” *Larisa’s*, 362 Or. at 133 (2017). Furthermore, “a transfer induced by fraud or material misrepresentation is subject to rescission and restitution. The transferee is liable in restitution as necessary to avoid unjust enrichment.” *Id.* (quoting Restatement (3d) Restitution § 13(1)).

Plaintiffs identify the receipt of benefits by fraud or deception as the form of unjust enrichment. (Pls.’ Suppl., 33.) Plaintiffs have pleaded facts supporting the proposition that GAT fraudulently obtained benefits from Plaintiffs (the excessive service costs actually collected) by misrepresenting in its complaints the fees it would seek and by seeking expedited service fees that were not necessary or even incurred. (Am. Compl. ¶ 10–11.) Plaintiffs also have pleaded facts showing that Vision is a wholly owned and operated subsidiary of GAT that acted in concert with GAT to profit through the alleged scheme. (Am. Compl. ¶ 7, 10, 11, 19.) Therefore, the court finds that Plaintiffs have properly stated a claim for unjust enrichment.

Because the Plaintiffs have plausibly stated claims under the UTPA and common law unjust enrichment, Plaintiffs have demonstrated the necessary probability of success to survive the second step of the anti-SLAPP analysis in a challenge based on legal sufficiency.

3. factual sufficiency

Defendants additionally argue that Plaintiff's allegations claims are not factually sufficient to constitute "substantial evidence" for the purposes of anti-SLAPP. (Defs.' Suppl., 11–12.) Although such an argument could have merit in state court, such an argument is premature at this stage of the litigation.¹⁰ In federal court, an anti-SLAPP motion to strike that challenges the factual sufficiency of a claim must be evaluated under the Rule 56 standard for summary judgment. *Planned Parenthood*, 890 F.3d at 834. "But in such a case, discovery must be allowed, with opportunities to supplement evidence based on the factual challenges, before any decision is made by the court." *Id.* Here, there has been no discovery, and the court examines only the legal sufficiency of the Defendants' anti-SLAPP motion to strike under Rule 12(b)(6). *Miller*, 2019 WL 1871011, at *4. Accordingly, Defendants may choose to challenge Plaintiffs' claims as factually insufficient following completion of discovery. *See Planned Parenthood*, 890 F.3d at 835 ("[T]he district court correctly applied a Rule 12(b)(6) standard to Defendants' Motion to Strike challenging the legal sufficiency of Plaintiffs' complaint, and the district court did not err in declining to evaluate the factual sufficiency of the complaint at the pleading stage"). This court declines to address any of Defendants' evidentiary-based arguments.

¹⁰ Plaintiffs rely on *Schwern v. Plunkett*, 845 F.3d 1241 (9th Cir. 2017). The Ninth Circuit decided *Schwern* a year before it addressed the intersection of state anti-SLAPP and the Federal Rules of Civil Procedure in *Planned Parenthood*; accordingly, *Schwern* does not control.

In sum, because Plaintiffs have established a probability that they will prevail on their state law claims as required in a challenge to the claims' legal sufficiency in federal court, Defendants are not entitled to relief under Oregon's anti-SLAPP law.

Conclusion

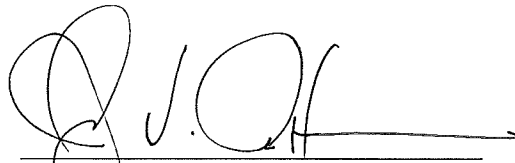
For the reasons stated above, Defendants' special motion to strike under Oregon's anti-SLAPP statute within its motion to dismiss (ECF No. 19) should be DENIED.

Scheduling Order

The Findings and Recommendation will be referred to U.S. District Court Judge Michael H. Simon for review. Objections, if any, are due within fourteen (14) days. If no objections are filed, then the Findings and Recommendation will go under advisement on that date.

If objections are filed, then a response is due within fourteen (14) days after being served with a copy of the objections. When the response is due or filed, whichever date is earlier, the Findings and Recommendation will go under advisement.

DATED this 14th day of February, 2020.



JOHN V. ACOSTA
United States Magistrate Judge